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IN THE

Supreme Court of the United States

TERM 1957

No. 721

EUGENE S. CONLIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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January 25th, 1957.

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Opinions Below

The majority opinion of the United States Court of Claims together with the dissenting opinion, are not as yet reported and for convenience are printed in the appendix to this petition.

Jurisdiction

The judgment of the United States Court of Claims was entered on December 5th, 1956. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

Questions Presented

That the Statute of Limitations did not bar the petitioner's cause of action, and the Court of Claims decision

is in conflict with its own decisions, and that of the Supreme Court of the United States.

That petitioner was deprived of his rights under law to receive disability retirement pay for disabilities incurred as a result of his World War II injuries.

That on petitioner's complaint in the United States Court of Claims, and based upon the decisions of this Court and the Court of Claims itself, the petitioner was entitled to the monthly payments that became due and payable to him, and the Statute of Limitations did not apply to such payments.

That petitioner's cause of action should not have been dismissed and that the issues should have been tried on the merits.

That the petitioner was deprived of the right to appear and present evidence before an army board for the corrections of military records as provided by statute.

Statutes Involved

Section 302(a) and (b) Servicemen's Readjustment Act of 1944 and as amended (38 U.S.C. 693(i), which provides for the creation by the United States Army and other branches of the armed services, of Disability Review Boards, when officers are released from the armed services with disabilities and without pay.

P.L. 220, 82nd Congress, 1st Session, 65 Stat. 655; 60 Stat. 812, 837, 5 U.S.C. Supp. V, 191(a) amending Section 207 of the Legislative Reorganization Act of 1946, and which provides for the creation and the correction of military records.

10 U.S.C. 961-963 pertaining to retirement of Army Officers and the creation and the powers of Army Retiring Boards.

28 U.S.C. 2501 and as amended September 3rd, 1954, 68 Stat. 1246 which pertains to the barring of actions filed six years after the claim first accrued.

Statement

Petitioner filed a claim against the respondent in the United States Court of Claims in 1956 for disability retirement pay as a Major, Army United States, for injuries incurred by him and as an incident to his military service in World War II, the removal of his right kidney and other disabilities.

Since 1937, petitioner had been engaged in military activities both in the United States and overseas. In 1941 when petitioner entered military service and on various occasions thereafter he was examined by military medical officers and always found fit for full military duties.

On September 20th, 1945, petitioner was examined by medical officers of the United States Army at the Separation Center which the Army maintained at Fort Dix, N. J. and as a result of said medical examination was ordered to Tilton General Hospital, at Fort Dix, N. J.

After three months in the above named hospital, plaintiff, on November 20th, 1945, was operated upon, *and his right kidney was removed.*

On April 11th, 1946, petitioner was ordered to and did appear before an Army Retiring Board.

On May 1st, 1946, an Army Retiring Board found that the petitioner *was not* physically disqualified to perform full military duties, and did not recommend to the then Secretary of War that the petitioner be retired for physical disability.

On August 27th, 1946, petitioner reverted to an inactive status in the United States Army.

On September 3rd, 1946, petitioner, after review of his medical records, by the Veterans Administration, was awarded 100% disability compensation for World War II disability (same as those considered by the Army Retiring Board on May 1st, 1946).

On February 26th, 1946, petitioner appeared before an Army Retiring Board at Fort Dix, N. J. and although petitioner advised the Board of the action taken by the Veterans Administration in awarding him disability compensation *he was again found to be physically qualified for full military duty,* and refused to recommend to the Secretary of War that he be granted disability retirement.

On October 24th, 1947, petitioner's rating for disability retirement compensation was reduced by the Veterans Administration from 100% to that of 60% for disabilities incurred in World War II (same as those considered by Army Retiring Board on February 26th, 1946.

On July 29th, petitioner was informed by the then War Dept. (later changed to Dept. of Defense) that a review of his medical records showed that he might have an incapacitating defect and he was authorized to enter the Walter Reed Hospital, in Washington, D.C. at his own expense for further observation. Petitioner did enter said hospital and remained there pending observation and study of his medical records.

On March 1st, 1949, petitioner appeared before an Army Retiring Board, convened at Walter Reed General Hospital. He introduced testimony of outstanding doctors, showing his permanent physical disabilities, and called the Board's attention to the action taken by the Veterans Administration. He was again advised that the Board *did not* find him disqualified for full military duty.

As a result of the findings of three Army Retiring Boards, to the effect that the petitioner was qualified to perform

full military duty (although such was not the fact), the petitioner was offered and did accept a commission as an officer in the Reserve Corps of the United States Army.

On April 11th, 1951, and on April 27th, 1951, petitioner was examined by medical officers of the United States Army in connection with his application for summer training. After such examination petitioner *was found physically disqualified for full military duty* (same disabilities incurred by petitioner in World War II shown and are upon the same record before all three Army Retiring Boards).

On February 20th, 1952, petitioner was transferred to the Honorary Reserve of the Army because of his physical disabilities.

On July 8th, 1955, and on various occasions thereafter petitioner made application to the Department of Defense for permission to appear before an Army Disability Review Board as provided by Congress (38 U.S.C. 693 (i)). This privilege was denied petitioner by the Army because it claimed that the Army Disability Review Board could consider only those cases of officers who had been retired for physical disability and without pay.

On August 3rd, 1955, the Department of the Army advised the petitioner that he could apply for relief under the provisions of Section 207 of the Legislative Reorganization Act of 1946 and as amended, for consideration of his claim before an Army Board for the Correction of military records.

On September 2nd, 1955, petitioner made application for permission to appear and submit evidence to an Army Board for the correction of military records.

On February 8th, 1956 and on April 27th, 1956, petitioner was informed that his application to appear and submit evidence of his physical incapacity to an Army

Board for the correction of military pleas had been denied.

On May 29th, 1956, petitioner filed his complaint in the United States Court of Claims. The United States then moved to dismiss the complaint, and on December 5th, 1956, the U. S. Court of Claims sustained the respondents contention that the statute of limitations barred plaintiffs cause of action.

Two judges of the Court of Claims dissented from the majority ruling.

Reasons Why the Writ Should be Granted

The statute of limitations did not bar the petitioners cause of action. On the same day that the United States Court of Claims handed down its decision in the action at Bar, it decided identical questions which were similar to that of the petitioner's claim. These decisions are attached to the appendix, as they have not as yet been reported. The minority opinions of the Court of Claims, and stated in part as follows (p. 4):

> "We do not agree with the opinion of the majority of the Court which results in the dismissal of plaintiff's entire claim. This is a suit to recover unpaid installments of disability retired pay which plaintiff claims were due him under applicable statutes and were wrongfully denied him by the Government each month as such pay became due beginning with August 31, 1946 following his alleged wrongful release to inactive duty without disability retirement pay on August 27th, 1946." • • •
>
> (See Par. 34, Petition in Court of Claims.)
>
> "Suits for periodic installments of pay arising under or founded upon an act of Congress involve multiple causes of action, each of which accrues on

the date when under the applicable acts the pay is due and is wrongfully withheld and the six year statute of limitations run separately on each such claim for pay from the date on which it is due and not paid. See Cannon et al. *v.* United States, and John A. Furlong *v.* United States, this day decided, and cases cited therein. See also Gordon *v.* United States, 134 Ct. Claims 840. It would therefore follow that the plaintiff's petition herein should be dismissed only as to those installments of disability retired pay claimed were due and unpaid more than six years prior to the filing of his petition on May 29, 1956. McCormick *v.* United States, 124 Ct. Claims 111.

"Although the judges participating in the majority opinion in this case appear to have conceded in the Gordon case supra, that suits for recovery of unpaid installments of retired pay involve multiple causes of action on which the statute of limitations runs separately from the time the pay is due and not paid and that claims for those installments which accrue within the six years prior to the filing of the petition are timely within the meaning of the statute of limitations, *in the instant opinion the majority seems to hold that a suit for wrongfully withheld disability retired pay involves but one cause of action* (italics ours). *The majority opinion herein is not altogether clear as to when that one cause of action accrued.*"

The majority opinion in the Conlin decision states in part page 3:

> "It was on May 1st, 1946, that * * * all events had transpired to give plaintiff a right of action on his claim and it was then his cause of action first accrued. * * *"

On the same day that the opinions were handed down the United States Court of Claims said in the *Furlong*

decision, and attached to appendix herein as in part follows:

LITTLETON, *Judge*, delivered the following opinion:

"Plaintiff, a former Army reserve officer, brought this suit to recover disability retirement pay from July 18, 1946 to date, less disability compensation received from the Veterans Administration. The petition was filed August 5, 1954, and the case comes before the court on defendant's motion to dismiss plaintiff's petition, as amended, on the ground that the plaintiff's claim, if any, is barred by the statute of limitations."[1]

"He was informed by the doctors that his disabilities were not sufficient to make him eligible for retirement benefits. Shortly thereafter on July 18, 1946, plaintiff was separated from military service not by reason of physical disability, with the rank of major."

"It is plaintiff's position that an honest evaluation of his case by Army authorities would have resulted in his having been declared eligible for the retired benefits provided for by statute, but

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[1] 28 U. S. C. 2501 provides in pertinent part: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition is filed * * * within six years after such claim first accrues."

Defendant's motion states as follows: "Defendant moves to dismiss plaintiff's petition, as amended, on the ground that the Court does not have jurisdiction thereof since it appears on its face that the claim sued on first accrued more than six years prior to the filing of plaintiff's petition, as amended, and is now barred by the statute of limitations."

In its conclusion in its brief in support of its motion, the defendant makes this statement: "Since there is no clear showing in plaintiff's petition of arbitrary or capricious action on the part of the Secretary of War, or any of his subordinate officials, plaintiff's petition does not state a cause of action within the jurisdiction of this Court and it should therefore be dismissed."

The motion itself does not include this ground for dismissal and as a result will not be considered by this court in rendering its opinion.

that he was deprived of such statutory benefits by the arbitrary, capricious and unsupported findings and decision of the Army.

"Defendant has moved to dismiss the petition on the ground that plaintiff's claim, on which he bases his suit, accrued upon his separation from the service on July 18, 1946, without retirement benefits, and is therefore beyond the six-year statute of limitations applying to claims filed in this court."

"The retirement pay for which plaintiff sues is, in effect, an annuity due and payable periodically upon the last day of each month during retirement. Suits involving claims for periodic compensation involve multiple causes of action and are continuing claims. The liability on the part of the Government arises each time it fails to make payment when it is due, as required by statute. Upon each occasion that a payment is withheld a new cause of action upon such claim accrues to the plaintiff, and only those claims for installments which were due and payable more than six years before the filing of the petition are barred by the statute of limitation of six years.

"This rule is supported by a number of decisions of this court and the Supreme Court."

"In the instant case, plaintiff was, as we have said, separated from the service on July 18, 1946. Under the allegations of plaintiff's petition, which, for the purpose of the motion, we must accept as true, he should have been retired on that date for disability incurred as an incident of the service while on active duty and should have been awarded disability retired pay. Presumably his first installment of such pay was due and payable to him on July 31, 1946, and monthly thereafter. Since plaintiff's petition was filed in this court on August 5, 1954, all installments of retired pay claimed which

were due and payable, and therefore first accrued, after July 31, 1948, are not barred by the statute of limitations, while all installments due and payable prior to July 31, 1948, are forever barred by the statute.

"The defendant's motion will be granted as to plaintiff's claim for those installments of disability retired pay due and payable from July 18, 1946 to July 31, 1948, and will be overruled as to all payments due and payable from and after July 31, 1948."

Thus the Court of Claims in petitioner's case is establis' ing one proposition of Law, and in a similar cause of action, and on identical question of Law, deciding otherwise. Furthermore it has not, in case at bar, followed its own decisions, and that of the Supreme Court itself, and it quotes to sustain its petition in the *Furlong* case, *United States* v. *Watson*, 130 U. S. 80:

"• • • The claim sued on is valid as to that part of it which accrued after that date."

Cannon, et al. v. *U. S.; Coletta, et al.* v. *U. S.; Hass, et al.* v. *U. S.*, were all decided on December 5th, 1946, the same day as the *Furlong* and petitioner's claim, were determined. The Court of Claims followed the same reasoning in those cases as it did in the *Furlong* case (although not doing so in petitioner's action). It said in these three cases in part as follows:

"A cause of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitation begins to run. In an action for pay or wages, the suit for payment is maintainable *only* when payment is refused as it becomes due and payable.

"These cases present an analogous situation to the *John A. Furlong* case, No. 324-54, decided this day. In that case it is stated that claims for compensation due and payable periodically involve multiple causes of action with resultant liability on the part of the Government each time it fails to make payment, as required by statute. As stated in the *Furlong* case: 'Upon each occasion that a payment is withheld a new cause of action accrues to the plaintiff, and only those claims for installments which were due and payable more than six years before the filing of the petition are barred by the statute of limitation of six years.'"

"Even though some confusion has existed in the last few years due apparently to conflicting opinions regarding the application of the statute of limitation in cases of this type, as late as 1953, in *McCormick* v. *United States,* 124 C. Cls. 111, we adhered to what we now hold to be the correct rule with respect to the statute of limitation."

In *Uhley* v. *United States,* 128 Ct. Cl. 608, the Court in that case had before it an issue raised by a reserve army officer, who was released from active duty, without retirement benefits, and advised that he was not suffering from disabilities incurred as an incident of the service. He was informed that he was not entitled to the privilege of appearing before an Army Disability Review Board, for the reason that he was not retired for disability and without pay; that Congress had only provided in the Servicemen's Readjustment Act, for such privilege to be granted to those officers who were retired for disability, but without pay.

It was only in October 1951 after Congress had enacted legislation that Uhley was permitted to make an application to an Army Board for the Correction of Military

Records, and when Uhley did make such application for relief it was also denied to him. The Court of Claims in its opinion in the *Uhley* case, said in part as follows

* * * on Page 609:

> "At the time of his separation from the service, plaintiff was informed by medical officers of the Air Force that his disabilities were not sufficient to make him eligible for retirement benefits and he was released not for physical disability. As a result of said erroneous release and information, plaintiff was led to believe that his injuries were either not disabling enough for retirement, or if so, were not permanent and would eventually be cured or alleviated."

The Court of Claims further stated in the *Uhley* case (p. 612) in part as follows:

> "Plaintiff has asserted, and defendant has not, controverted, that until the passage of the Act of October 25th, 1951, there was no way for the plaintiff to obtain the necessary action necessary to correct an error or remove an injustice in regard to his military record. Plaintiff further asserts that his cause of action accrued, therefore, not at the time of his separation from the service, but at the time he was, as he alleges, arbitrarily and capriciously deprived of the right conferred by statute, to have his military record corrected. See Gordon *v.* U. S. this date decided."

The Court of Claims further stated in the *Uhley* case on page 612 report as follows:

> "Although the alleged error in plaintiff's military record was committed, if at all, at the time of his separation from the service in 1945, the wrong of which the plaintiff seeks judicial redress, is not the alleged error per se, but the alleged ar-

bitrary and capricious deprivation of his right conferred by the Oct of October 25th, 1951, to the action, necessary to correct an error or remove an injustice. Under these circumstances we are of the opinion that the suit is not covered by the Statute of Limitations. We think it is clear, under the facts and circumstances of this case, that plaintiff's claim did not accrue on December 24th, 1945 as defendant contends."

Petitioner was informed, by three retiring Boards, that *he was qualified to perform full miltary duties.* When he requested relief, he was informed (as Uhley was) that there was no authority for consideration by Army Disability Board because he had not been retired for disability and without pay. It was only in October 1951, as the Court of Claims said in the *Uhley* case, were rights of review made available to him.

As in the *Uhley* case, Conlin also was refused, consideration, by the Army Board for the Correction of Military records.

Thus as the Court of Claims further said in the *Uhley* case, on page 610 of that decision, in part as follows:

> "Because of the ruling of the Comptroller General, the Armed Services did not entertain any application for disability retirement until some time after the enactment on October 25, 1951 of P. L. 220, 82nd Congress, 1st Session, 65 Stat. 655; 5 U. S. C., Supp. V, 191 (a) Appendix, Section 207 of the Legislative Reorganization Act of 1946. In this Statute this omission in the jurisdiction of the Armed Services to consider disability retirement was corrected and authority given to boards for the correction of military and nonmilitary records to evaluate on such application."
>
> • • • p. 611 "but we should hear proof as to why the Air Force Board for the Correction of

Military Records denied plaintiff's application for correction of such records." * * *

"We have held that Reserve Officers are entitled to the same treatment as Regular Army Officers. Conlin *v. U. S.*, 121 C. Cls. 643. Disability retirement pay for non regular officers of the U. S. Army, such as plaintiff, was provided for by the Act of April 3, 1939 (54 Stat. 557) as amended 10 U. S. C. 456."

There are clearly conflicts in the decisions of the Court of Claims, as herein submitted and the petitioner's cause of action should not have been dismissed.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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January 25th, 1957.

APPENDIX

In the United States Court of Claims

No. 230-56

(Decided December 5, 1956)

EUGENE S. CONLIN v. THE UNITED STATES

Mr. Lewis Landes for the plaintiff.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub*, for the defendant.

ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S PETITION

LARAMORE, *Judge*, delivered the opinion of the court:

This is a claim for disability retirement pay by a former Reserve Corps officer of the Army of the United States.

The facts as alleged in plaintiff's petition show that he was engaged in military activities since 1937, both in the United States and overseas. He was examined on various occasions by Army doctors, in connection with his military duties, and found to be in sound physical condition. On September 20, 1945, plaintiff was examined physically at the Separation Center of the U. S. Army, Fort Dix, New Jersey, prior to his separation from the service, and was ordered to the Tilton General Hospital, Fort Dix, for further observation. On November 20, 1945, plaintiff was operated on and his right kidney was removed.

On April 11, 1946, an Army disposition board recommended that plaintiff be ordered to appear before a retir-

ing board. Thereafter, on May 1, 1946, an Army retiring board found that plaintiff was not permanently incapacitated for active service. On August 27, 1946, plaintiff reverted to an inactive status.

On September 3, 1946, plaintiff was awarded compensation from the Veterans Administration based on a disability rating of 100 percent.

On February 26, 1947, plaintiff again appeared before a retiring board, and again the board refused to recommend that plaintiff be granted retirement for physical disability.

On October 24, 1947, plaintiff was informed by the Veterans Administration that after April 1, 1947, he would be rated by the Veterans Administration as 60 percent disabled.

On July 29, 1948, plaintiff was informed by the War Department (now Department of the Army) that a review of his medical record showed he might have an incapacitating defect and he was authorized, at his own expense, to enter Walter Reed Hospital for observation and, if warranted, he could appear before an Army retiring board.

On March 1, 1949, after examination at Walter Reed Hospital, plaintiff again appeared before an Army retiring board, and again the Army retiring board refused to recommend that plaintiff be granted disability retirement benefits.

Since the time of the last retiring board action plaintiff was examined twice by Army doctors in connection with his then Reserve status, and each time he was found to be physically disqualified to perform the duties of his office. On February 20, 1952, plaintiff was transferred from his Reserve status to that in the Honorary Reserve, Army of the United States, for reasons physical.

Appendix

On July 8, 1955, and various times thereafter, plaintiff made application to the Department of the Army, to grant him opportunity to appear before an Army retiring board. Each time permission was refused.

On September 2, 1955, plaintiff made application to the Army for a consideration of his application by the Army Board for Correction of Military Records. On February 8, 1956, plaintiff's application was denied.

On April 27, 1956, plaintiff was informed that his application to appear before an Army board of review had been denied.

In this posture of the case the defendant has moved to dismiss plaintiff's petition on the ground that the claim is barred by the statute of limitations, 28 U. S. C. § 2501, which provides that:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Plaintiff appeared before three retiring boards, *i. e.*, May 1, 1946, February 26, 1947, and March 1, 1949, all of which found him not permanently incapacitated for service. There is no contention here that the retiring boards' proceedings were not approved by the Secretary of the Army, hence it can be assumed said proceedings were approved. At any rate, plaintiff knew first on May 1, 1946, that he would not be granted retirement pay. In fact, plaintiff has alleged in rhetorical paragraph 34 of his petition that the action of the United States Army in releasing him to inactive duty as aforesaid, without disability retirement pay, was arbitrary, capricious, without

authority and law, and that he is entitled to disability retirement pay as a Major, Army of the United States, and that he as such is entitled to the disability retirement pay of $237.20 per month from August 27, 1946, and in addition any and all increases granted retired officers by law, less any Veterans Administration disability compensation received by the plaintiff during this entire period.

The foregoing allegation conclusively shows that plaintiff thought he had a right of action at the time he was released to inactive duty and is now claiming rights from that date.

It was on May 1, 1946, that all events had transpired to give plaintiff a right of action on his claim and it was then his cause of action first accrued. *Rosnick* v. *United States,* 132 C. Cls. 1; *Girault* v. *United States,* No. 50474, decided November 8, 1955; *Duff* v. *United States,* No. 194-55, decided November 8, 1955; *Odell* v. *United States,* No. 145-55, decided April 3, 1956; *Levine* v. *United States,* No. 482-53, decided January 31, 1956; *Soukaras* v. *United States,* No. 346-55, decided May 1, 1956.

Plaintiff's application to the Army Board for Correction of Military Records would not toll the running of the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Girault* v. *United States, supra; MacFarlane* v. *United States,* No. 294-55, decided April 3, 1956.

Plaintiff's claim first accrued when he reverted to an inactive status pursuant to the action of the Army retiring board, or at the very latest on March 1, 1949, the last action of the retiring board. The petition was filed May 29, 1956, more than six years thereafter and is barred by the statute of limitations, *supra.*

Defendant's motion is granted, and plaintiff's petition is dismissed.

It is so ordered.

WHITAKER, *Judge,* and JONES, *Chief Judge,* concur.

LITTLETON, *Judge,* and MADDEN, *Judge,* dissenting:

We do not agree with the opinion of the majority of the court which results in the dismissal of plaintiff's entire claim. This is a suit to recover unpaid installments of disability retired pay which plaintiff claims were due him under applcable statutes and were wrongfully denied him by the Government each month as such pay became due, beginning with August 31, 1946, following his allegedly wrongful release to inactive duty without disability retirement or disability retired pay on August 27, 1946. The petition was filed on May 29, 1956, and the defendant has filed its motion to dismiss solely on the ground that the claims stated therein are barred by the statute of limitations. 28 U. S. C. 2501.

Suits for periodic installments of pay arising under or founded upon an act of Congress involve multiple causes of action, each of which accrues on the date when under the applicable act the pay is due and is wrongfully withheld, and the six-year statute of limitations runs separately on each such claim for pay from the date on which it is due and not paid. See *Cannon et al.* v. *United States,* No. 397-52, and *John A. Furlong* v. *United States,* No. 324-54, this day decided, and cases cited therein. See also *Gordon* v. *United States,* 134 C. Cls. 840. It would therefore follow that plaintiff's petition herein should be dismissed only as to those installments of disability retired pay claimed which were due and unpaid more than six

years prior to the filing of his petition on May 29, 1956. *McCormick* v. *United States,* 124 C. Cls. 111.

Although the judges participating in the majority opinion in this case appear to have conceded in the *Gordon* case *supra,* that suits for recovery of unpaid installments of retired pay involve multiple causes of action on which the statute of limitation runs separately from the time the pay is due and not paid and that claims for those installments which accrue within the six years prior to the filing of the petition are timely within the meaning of the statute of limitations, in the instant opinion the majority seems to hold that a suit for wrongfully withheld disability retired pay involves but one cause of action. The majority opinion herein is not altogether clear as to when that one cause of action accrued. At one point the majority states that it was on May 1, 1946, several months *before* plaintiff was released to inactive duty, "that all events had transpired to give plaintiff a right of action on his claim and it was then his cause of action first accrued." We cannot think just what cause of action plaintiff would have had at that particular time of which the Court of Claims could have taken jurisdiction. Certainly plaintiff had no cause of action for retired pay while he was still on active duty, and inasmuch as this court's jurisdiction is limited to the rendition of money judgments, we believe this conclusion of the majority is in error. The events which must transpire before a plaintiff has a right of action to recover pay are that the pay must be due and the Government must have refused to make payment. Plaintiff's suit is to recover disability retired pay. On May 1, 1946, plaintiff was still on active duty and no retired pay was then due him.

Appendix

Finally the majority opinion states that plaintiff's claim for disability retired pay first accrued on August 27, 1946, when he reverted to inactive status, or at the very latest on March 1, 1949, when the last action of a retiring board took place. On August 27, 1946, when plaintiff was released to inactive status, the Government did not owe him any part of the pay sued for, i.e., disability retired pay, and therefore no cause of action for such pay accrued on that date. The retiring board's decision issued on March 1, 1949, may have been the Army's "last word" on *why* it was not going to grant plaintiff's request to retire him for disability and give him disability retired pay, but if, despite that decision, plaintiff was entitled under a statute to receive such pay, he was entitled to receive it beginning with the end of the month in which he was released from active duty and for every month thereafter.

We think that defendant's motion to dismiss the petition should be granted as to all installments of disability retired pay which were claimed to be due and not paid more than six years prior to the filing of plaintiff's petition, and should be denied as to all installments claimed to be due and not paid within the six years prior to such filing.

Appendix

In the United States Court of Claims

No. 324-54

(Decided December 5, 1956)

JOHN A. FURLONG v. THE UNITED STATES

Mr. John Geyer Tausig for the plaintiff.

Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

ON DEFENDANT'S MOTION TO DISMISS AMENDED PETITION

LITTLETON, *Judge,* delivered the following opinion:

Plaintiff, a former Army reserve officer, brought this suit to recover disability retirement pay from July 18, 1946 to date, less disability compensation received from the Veterans Administration. The petition was filed August 5, 1954, and the case comes before the court on defendant's motion to dismiss plaintiff's petition, as amended, on the ground that the plaintiff's claim, if any, is barred by the statute of limitations.[1]

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[1] 28 U. S. C. 2501 provides in pertinent part: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition is filed * * * within six years after such claim first accrues."

Defendant's motion states as follows: "Defendant moves to dismiss plaintiff's petition, as amended, on the ground that the Court does not have jurisdiction thereof since it appears on its face that the claim sued on first accrued more than six years prior to the filing of plaintiff's petition, as amended, and is now barred by the statute of limitations."

In its conclusion in its brief in support of its motion, the defendant makes this statement: "Since there is no clear showing in plaintiff's

Appendix

On September 12, 1945, plaintiff, while serving on active duty with the United States Army in the Philippines, was injured when struck in the abdomen by a bullet which came through the canvas of his tent quarters. Attempts made by the Army doctors to remove the bullet were unsuccessful and the bullet has remained in the plaintiff's hip to this day. On July 18, 1946, the plaintiff was separated from the service not by reason of physical disability. Immediately prior to this separation plaintiff was examined at Lovell General Hospital, Camp Devens, Massachusetts, for the purpose of determining whether an operation should be performed to remove the bullet from his body. The medical officers at the hospital decided not to perform the operation and plaintiff sought their advice as to whether he should appear before a Medical Disposition Board and an Army Retiring Board. He was informed by the doctors that his disabilities were not sufficient to make him eligible for retirement benefits. Shortly thereafter on July 18, 1946, plaintiff was separated from military service not by reason of physical disability, with the rank of major.

Following his separation, plaintiff's physical condition grew worse and on January 3, 1947, he sought the advice of the Reserve Officer's Association as to whether, in the opinion of the association, it would be possible for him to appear before an Army Retiring Board. Plaintiff's request for permission to appear before the Board was

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petition of arbitrary or capricious action on the part of the Secretary of War, or any of his subordinate officials, plaintiff's petition does not state a cause of action within the jurisdiction of this Court and it should therefore be dismissed."

The motion itself does not include this ground for dismissal and as a result will not be considered by this court in rendering its opinion.

forwarded by the association to the Adjutant General of the Army. On February 5, 1947, plaintiff was informed that his request would be given consideration if he submitted evidence which would justify his appearance before the Board. Plaintiff submitted evidence along this line and on March 22, 1948, he was directed to enter Murphy General Hospital, Waltham, Massachusetts, for physical evaluation preliminary to an appearance before an Army Retiring Board. Plaintiff entered the hospital on August 3, 1948, which was two years after his release from active duty. On August 6, 1948, the Retiring Board found that plaintiff was not at that time permanently incapacitated for active duty. This decision was approved by the Secretary of War on September 2, 1948.

It is plaintiff's position that an honest evaluation of his case by Army authorities would have resulted in his having been declared eligible for the retired benefits provided for by statute, but that he was deprived of such statutory benefits by the arbitrary, capricious and unsupported findings and decision of the Army.

Defendant has moved to dismiss the petition on the ground that plaintiff's claim, on which he bases his suit, accrued upon his separation from the service on July 18, 1946, without retirement benefits, and is therefore beyond the six-year statute of limitations applying to claims filed in this court.

We must assume, for the purposes of defendant's motion, that the Army violated the law when it released plaintiff from the service without retirement benefits provided for by applicable statutes and that plaintiff has a claim against the United States founded upon an act of Congress, 28 U. S. C. 1491 (2). We therefore, at this time,

need only decide whether plaintiff's claim, as defendant contends in his motion, is barred by the statute of limitations.

The retirement pay for which plaintiff sues is, in effect, an annuity due and payable periodically upon the last day of each month during retirement. Suits involving claims for periodic compensation involve multiple causes of action and are continuing claims. The liability on the part of the Government arises each time it fails to make payment when it is due, as required by statute. Upon each occasion that a payment is withheld a new cause of action upon such claim accrues to the plaintiff, and only those claims for installments which were due and payable more than six years before the filing of the petition are barred by the statute of limitation of six years.

This rule is supported by a number of decisions of this court and the Supreme Court. In the early case of *Bachelor* v. *United States*, 8 C. Cls. 235, the plaintiff sued for compensation, paid annually on the fiscal year basis, which was withheld from him by the Treasury. Some of the years for which compensation was claimed fell within and part without the six-year period provided for in the statute of limitations. This court, in speaking of the statute of limitations, said:

> • • • But when the office, as in this case, is continued for more than one year, and the compensation payable annually, the statute, as in the case of a debt payable at several times, that is, by installments, begins to run from the end of each fiscal year, and cuts off all compensation not falling due within six years before the institution of the suit. • • •

The *Bachelor* case was followed in *Ellsworth* v. *United States,* 14 C. Cls. 382, which decision was affirmed by the Supreme Court in *United States* v. *Ellsworth,* 101 U. S. 170. In *Watson* v. *United States,* 21 C. Cls. 511, a retired Army officer sued for longevity pay which had been denied him by the Army more than six years preceding the filing of his petition. The Government's demurrer was sustained as to that part of plaintiff's claim which had accrued more than six years prior to the filing of the petition, and overruled as to the balance. The Supreme Court affirmed the decision of this court in *United States* v. *Watson,* 130 U. S. 80, saying:

> • • • We also concur with the Court of Claims, that in this case there can be no recovery for any part of the claim that accrued prior to February 24, 1880, the day when the bar of the Statute of Limitations took effect.
>
> • • • The claim sued on is valid as to that part of it which accrued after that date.

Some of the many other cases in which we have followed this rule are *Hornblass* v. *United States,* 93 C. Cls. 148; *Hermann* v. *United States,* 113 C. Cls. 54; *Pacific Maritime Association* v. *United States,* 123 C. Cls. 667.

Although some of the recent decisions of this court are to the contrary, we are of the opinion upon further consideration of the question that the above-stated doctrine is the correct one and that it provides a rule to which this court should adhere in claims of this type.

In the instant case, plaintiff was, as we have said, separated from the service on July 18, 1946. Under the allegations of plaintiff's petition, which, for the purpose

of the motion, we must accept as true, he should have been retired on that date for disability incurred as an incident of the service while on active duty and should have been awarded disability retired pay. Presumably his first installment of such pay was due and payable to him on July 31, 1946, and monthly thereafter. Since plaintiff's petition was filed in this court on August 5, 1954, all installments of retired pay claimed which were due and payable, and therefore first accrued, after July 31, 1948, are not barred by the statute of limitations, while all installments due and payable prior to July 31, 1948, are forever barred by the statute.

The defendant's motion will be granted as to plaintiff's claim for those installments of disability retired pay due and payable from July 18, 1946 to July 31, 1948, and will be overruled as to all payments due and payable from and after July 31, 1948.

It is so ordered.

MADDEN, *Judge,* concurs.

JONES, *Chief Judge,* delivered the following opinion:

I concur with the opinion by Judge Littleton in so far as it denies in part and grants in part the defendant's motion to dismiss. What places this case in a somewhat different light from that usually encountered in the disability retired pay cases is the fact that unlike those cases, plaintiff's separation and initial appearance before the Army Retiring Board did not occur as part of the same transaction.

He was separated in 1946, but he did not appear before the retiring board until 1948. He alleges that his failure to appear before the board at the time of his separation

was due to the fact that he was misled by the defendant's medical officers who examined him at that time; that when he suggested that he should appear before a Medical Disposition and an Army Retiring Board they informed him that his disabilities were insufficient to make him eligible for retired pay or, if so, were not of a permanent nature; that as a result he was separated from the service as a major physically fit for active duty, but that after several months of treatment and disappointment it became apparent that plaintiff's condition would never improve and that he was permanently incapacitated and physically unfit for active duty.

If plaintiff was thus misled, then I am of the opinion that the question of his entitlement to retirement benefits did not become closed in so far as the Army was concerned until September 2, 1948, on which date the Secretary of the Army approved the findings of the Army Retiring Board which denied him disability retired pay.

I would deny the Government's motion and permit plaintiff to go to trial with the opportunity to show, first, whether he was in fact misled, and, second, whether the retiring board's decision against him was the result of arbitrary or capricious action.

WHITAKER, *Judge*, delivered the following opinion:

I agree with the Chief Judge that plaintiff's cause of action did not accrue until September 2, 1948, which was the date the Secretary of the Army approved the action of the retiring board denying plaintiff disability retired pay.

Ordinarily the time for an officer to make application to go before a retiring board is before he is separated from the service, but there is no requirement that he do so then

or not at all. See *Updike* v. *United States,* 132 C. Cls. 627; *Steen* v. *United States,* No. 217-53, decided June 5, 1956; *Palluconi* v. *United States,* No. 420-54, decided June 5, 1956; *Charles Edward Vaughn* v. *United States,* No. 355-54, decided July 12, 1956. Plaintiff did not do so and was separated not for physical disability.

This did not give him a right of action in this court, because Congress has vested in a retiring board and the Secretary of the service concerned jurisdiction to determine an officer's right to disability retired pay. We can never acquire jurisdiction of an officer's claim to retired pay until this board and the Secretary have acted or have refused to act. It is then that an officer's right of action in this court first accrues. The acts conferring jurisdiction on this court require that the suit must be brought within six years from this time.

Plaintiff's cause of action, therefore, accrued on September 2, 1948, the date the Secretary approved the action of the retiring board. Plaintiff's petition was filed within six years thereafter.

I agree with the Chief Judge that plaintiff should be permitted to go to trial with the opportunity to show whether the retiring board's decision against him was the result of arbitrary or capricious action.

LARAMORE, *Judge,* dissents.

Appendix

In the United States Court of Claims

(Decided December 5, 1956)

No. 397-52

LUTHER B. CANNON, ET AL. v. THE UNITED STATES [In the cases of *Walter DeSouto, Jesse R. Gordon* and *Robert M. Molesworth* v. *The United States*]

No. 542-52

GERARD COLETTA, ET AL. v. THE UNITED STATES [In the case of *Arthur N. Johnson* v. *The United States*]

No. 82-53

MAX F. HAAS, FRANK TURNER and WALTER C. ZIMMERMAN v. THE UNITED STATES

Mr. Claude L. Dawson for the plaintiffs.

Mr. LeRoy Southmayd, Jr., with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

ON PLAINTIFFS' AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

LITTLETON, *Judge,* delivered the following opinion:

These cases are now before the court on plaintiffs' motions for summary judgments and defendant's cross-motions for summary judgments. They were consolidated

for hearing and decision inasmuch as they involve the same question of law.

The plaintiffs were civilian employees of the United States at the Mare Island, Boston and Philadelphia Naval Shipyards. They were each reduced in rank, grade and salary, which reductions were later set aside by decisions of the United States Civil Service Commission on the ground that such reductions violated the provisions of the Veterans' Preference Act of June 27, 1944.[1] The plaintiffs brought these suits to recover the difference in pay between the pay of the grade the Civil Service Commission held they were entitled to and the pay actually received during the period of reduction prior to restoration.

Defendant has stipulated to judgments as to all those plaintiffs who originally were parties in these actions and to whom the defendant concedes the statute of limitations does not present a bar to recovery. As to those plaintiffs remaining on the petitions, the defendant has conceded that the reductions in grade were illegal and plaintiffs are entitled to the pay claimed, but has filed its motions solely on the ground that plaintiffs' claims are now barred by the statute of limitations.

In support of its motions for summary judgments defendant argues that the date of the reduction in grade by the officials of the Naval shipyards, as to each plaintiff, is the date upon which the cause of action first accrued.

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[1] Section 14 (58 Stat. 387) provided for certain notice to be given to those entitled to the benefits of the act before they could be reduced in grade. The Commission found that the Government had not complied with this section and recommended that plaintiffs be restored to their old higher grades. Pursuant to the decisions and recommendations of the Civil Service Commission plaintiffs were so restored.

In each instance, the date of reduction in grade is more than six years prior to the filing of the petition.

In opposition to the defendant's motions and in support of their own, the plaintiffs urge us to hold that their causes of action first accrued when the Civil Service Commission held the reductions in grade to be illegal under the Veterans' Preference Act. With respect to each of the plaintiffs remaining on the petitions, the decision of the Commission holding the reduction to be illegal was issued within the six years prior to the filing of their petitions.

We do not agree with the contentions of either party as to the proper date upon which the causes of action first accrued. This is not a suit for restoration of grade, nor is it a suit for damages arising out of an alleged breach of employment contract. Plaintiffs are suing for wages which a statute provides are due and payable periodically to those persons holding the same grade to which the Civil Service Commission said the plaintiffs were entitled. We are of the opinion that no *cause of action for pay* accrues on the date of a demotion in grade and pay, or of a discharge, unless that date also happens to be a payday and the Government failed to make payment to the plaintiffs for the pay period just completed.

Neither did a cause of action for pay first accrue, as contended by plaintiffs, on the date when the Civil Service Commission rendered its decision holding the reduction in grade illegal and recommending that these plaintiffs be restored to their higher grades, whether that decision was mandatory, as claimed by plaintiffs, or merely advisory as claimed by defendant. If, as urged by plaintiffs, the decision of the Civil Service Commission recommending restoration to the higher grade in each case was manda-

tory within the meaning of the statute on the employing agencies, a cause of action for enforcement of the order of the Commission for restoration might accrue in the District Court on the date of the issuance of that order where the employing agencies failed or refused to comply. If, as claimed by defendant, the order was not mandatory because issued prior to the August 4, 1947 amendment to section 14 of the Veterans' Preference Act specifically making such orders mandatory, that circumstance would only affect plaintiffs' rights to enforcement of the order in the District Court. However, we do not think that the mandatory nature of the decision of the Civil Service Commission is material on the issue of plaintiffs' rights to sue in this court under the Tucker Act for pay they did not receive during the period of wrongful demotion. The right of these plaintiffs to that pay is not dependent on the mandatory quality of the order of the Commission but rather on the correctness of that order as a matter of law insofar as it determines that these plaintiffs were illegally demoted and were at all times entitled to the higher grade from which they were demoted. If the decision of the Commission is correct, and defendant does not contend that it was incorrect, then it follows that plaintiffs should have been paid the salary or wages required by applicable statute for the grades from which they were never legally removed, rather than the lower salary or wages of the grades in which they were illegally placed by the complying agencies. See *David Simon* v. *United States,* 113 C. Cls. 182. But their causes of action to recover such wrongfully withheld pay do not accrue on the dates of the decisions of the Civil Service Commission but rather on the various dates on which the higher pay was due and wrongfully withheld.

Appendix

A cause of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitation begins to run. In an action for pay or wages, the suit for payment is maintainable *only* when payment is refused as it becomes due and payable.

These cases present an analogous situation to the *John A. Furlong* case, No. 324-54, decided this day. In that case it is stated that claims for compensation due and payable periodically involve multiple causes of action with resultant liability on the part of the Government each time it fails to make payment, as required by statute. As stated in the *Furlong* case: "Upon each occasion that a payment is withheld a new cause of action accrues to the plaintiff, and only those claims for installments which were due and payable more than six years before the filing of the petition are barred by the statute of limitation of six years."

In a suit for damages arising out of the breach of an employment contract, the statute of limitation would run from the date of discharge or demotion. Williston on Contracts (Revised Ed., Vol. V., Sec. 1362) quotes from *Cutter* v. *Gillette*, 163 Mass. 95; 39 N. E. 1010, as follows:

> • • • The plaintiff's cause of action accrued when he was wrongfully discharged. *His suit is not for wages*, but for *damages* for breach of his contract by the defendant. • • • [Italics supplied.]

Similarly, a cause of action for *reinstatement* to a position from which an employee has been wrongfully demoted accrues at the time of the wrongful demotion and the statute of limitation will begin to run at that time. But these are not suits for reinstatement.

An entirely different situation is presented when, as in the case of the plaintiffs here, the suit is for unpaid wages or salary only. A claim or cause of action to recover salary or wages due under a contract or statute does not accrue until such time as the employer fails to make payment of the wages or salary when due. Where the terms of employment contemplate regular periods of service such as weekly, monthly or yearly, with payment for such services to be made at the end of each agreed period, *each failure* of the employer to pay the wages or salary at the end of the time stipulated for payment will give rise to a separate claim or cause of action for wages not paid and the statute of limitation runs separately on each claim. In the event of a suit for such wages or salary, the statute of limitation will bar only those claims which accrued more than the statutory period before the action was brought, which in this case is six years. See Wood on Limitations, Fourth Ed., pp. 670-675; Williston on Contracts, Revised Ed., Secs. 861, 862, and 864.

Defendant relies on *Group* v. *United States* and *Kiernan* v. *United States,* 125 C. Cls. 135, in which we decided similar cases against the plaintiffs. In deciding those cases we think the court mistakenly relied on the decision of the Second Circuit in *Schatte* v. *International Alliance, etc.,* 182 F. 2d 158, which correctly held that in a suit for *damages* for breach of an employment contract there is only one cause of action which accrues at the time of the breach. Upon reconsideration, we are of the opinion that our conclusion in those cases was erroneous insofar as it held that in a suit for pay the plaintiff had only one cause of action which arose or accrued at the time of the wrongful reduction. As hereinbefore noted, a claim for

wages or salary involves a different method of applying the statute of limitation than a suit which is predicated on a claim for damages resulting from a breach of an employment contract. We would therefore overrule our opinion in the *Group* and *Kiernan* cases, and in all other cases following that interpretation of the applicability of the statute of limitation or which apply the same rule in suits for wages or salary.

Even though some confusion has existed in the last few years due apparently to conflicting opinions regarding the application of the statute of limitation in cases of this type, as late as 1953, in *McCormick* v. *United States*, 124 C. Cls. 111, we adhered to what we now hold to be the correct rule with respect to the statute of limitation. In the *McCormick* case, plaintiff brought suit to recover the wages guaranteed him for a period of one year by the Selective Service and Training Act of 1940, 50 U. S. C. 308. The one-year statutory guaranty ran in his case from February 25, 1946 to February 29, 1947. Plaintiff filed his petition on July 25, 1952. Defendant moved to dismiss plaintiff's petition as to all pay claimed therein on the ground that plaintiff's cause of action first accrued on February 25, 1946, when he was first refused reinstatement in his old position and was placed in a position of lower grade and pay, such date being more than six years prior to the date on which the petition was filed. In refusing to dismiss the whole claim, Chief Judge Jones, speaking for the court, said:

> • • • Our six-year statute of limitations therefore bars recovery for any period prior to July 15, 1946. To that extent defendant's motion to dismiss must be allowed.

> We do not believe, however, that plaintiff is barred by limitations from recovery for the period July 15, 1946, to February 25, 1947.

To the same effect, see *Joseph S. Hart* v. *United States,* 125 C. Cls. 294 (June 1953).

Since plaintiffs' petitions and motions for summary judgment allege sufficient facts to entitle them to the relief claimed, it follows that plaintiffs' motions must be granted as to all claims for wages due and payable within the six years prior to the filing of their petitions and denied as to all other claims for wages. Defendant's motions must be granted as to all claims for wages due and payable prior to the six years previous to the filing of the petitions and denied as to the remainder.

It does not appear from the record in these cases on what basis the plaintiffs were paid, i. e., daily, weekly or monthly. It is accordingly impossible to indicate precisely what pay periods come within the statutory time. For example, if a plaintiff was paid on a monthly basis at the end of each calendar month and his petition was filed October 30, 1952, then he would be entitled to recover all payments due and payable from September 30, 1946, since his wages for October would not have been due and payable until October 31, 1946, which is within the six-year period.

Accordingly, if plaintiff Johnson had been paid on a monthly basis, under his petition filed on October 30, 1952, claiming all pay due him from March 18, 1946 to June 9, 1947, he would be entitled to summary judgment for all pay accruing from September 30, 1946 to June 9, 1947 (on which date he was restored to his former position and thereafter paid), and defendant would be entitled to

summary judgment dismissing the petition as to all claims for pay accruing from March 18, 1946 to September 30, 1946.

The following facts are undisputed concerning each of the plaintiffs herein:

The petition of WALTER DESOUTO was filed on July 29, 1952. He was reduced in grade on May 20, 1946, and was restored to his former position on June 9, 1947, by order of the Civil Service Commission.

The petition of JESSE R. GORDON was filed on July 29, 1952. He was reduced in grade on July 22, 1946, and was restored to his former position on June 9, 1947, by order of the Civil Service Commission.

The petition of ROBERT M. MOLESWORTH was filed on July 29, 1952. He was reduced in grade on July 1, 1946, and was restored to his former position on June 9, 1947, by order of the Civil Service Commission.

The petition of ARTHUR N. JOHNSON was filed on October 30, 1952. He was reduced in grade on March 18, 1946, and was restored to his former position on June 9, 1947, by order of the Civil Service Commission.

The petition of MAX F. HAAS was filed on March 6, 1953. He was reduced in grade on January 27, 1947, and was restored to his former position on May 18, 1947, by order of the Civil Service Commission.

The petition of FRANK TURNER was filed on March 6, 1953. He was reduced in grade on September 30, 1946, and was restored to his former position on May 19, 1947, by order of the Civil Service Commission.

The petition of WALTER C. ZIMMERMAN was filed on March 6, 1953. He was reduced in grade on June 10, 1946, and was restored to his former position on May 19, 1947, by order of the Civil Service Commission.

Defendant's motions for summary judgment are granted as to all amounts which accrued more than six years prior to the filing of the petitions and denied as to claims for pay which became due and payable and therefore accrued within six years of the filing of the petitions. Plaintiffs' motions for summary judgment are granted as to claims which accrued within six years of the filing of the petitions and denied as to claims accruing more than six years prior thereto. The amount due each plaintiff will be determined pursuant to Rule 38 (c) of this court.

It is so ordered.

MADDEN, *Judge*, concurs.

WHITAKER, *Judge*, delivered the following opinion, in which JONES, *Chief Judge*, joins:

These cases present an aspect of the applicability of the statute of limitations which is entirely different from that presented in *Furlong* v. *United States*, No. 324-54; and *Levadi* v. *United States*, No. 431-55, both this day decided. In the present case plaintiffs' rights are not dependent on the action of a board or agency, but exist or not entirely independently thereof. However, I do not agree that plaintiffs' causes of action accrued on each pay period.

The majority opinion correctly states:

> A cause of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitation begins to run. • • •

The first date on which plaintiffs could have instituted a suit in this court was the date upon which the Civil Service Commission rendered its decision. A suit instituted earlier

was subject to dismissal on motion on the ground that plaintiff had failed to exhaust his administrative remedies. *Martilla* v. *United States,* 118 C. Cls. 177; *John A. Adler, et al.* v. *United States,* No. 266-53, and related cases, decided March 6, 1956, *cert. den.* November 5, 1956.

The law vests in the Civil Service Commission jurisdiction to hear complaints of violations of the civil service law and regulations. In the absence of unusual circumstances, no court will entertain a suit to adjudicate an employee's claim until that Commission acts or delays unreasonably to act. Hence, his cause of action does not accrue until immediately after it has acted, and the statute of limitations does not begin to run until then. Otherwise stated, the statute is tolled until after plaintiff has completed pursuit of a remedy for the alleged wrong done him before the administrative tribunal given jurisdiction of such matters by Congress. After this tribunal has acted the statute begins to run.

This is true, I think, in this case, notwithstanding the fact that the Civil Service Commission could not order plaintiffs restored to their positions and order the payment to them of the pay of which they say they have been illegally deprived. This is because the Civil Service Commission is the body set up by Congress to see to it that the civil service laws are faithfully carried out, and to hear complaints of employees who think their rights have been violated. Since this is the body created by Congress to do this, it would be out of order for a court to entertain a suit by an employee until this body had had an opportunity to act.

Although its power was limited, it was still the body vested by Congress with supervision over the administration of the civil service laws.

As the Supreme Court said in *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, the denial or grant of relief before the exhaustion of all administrative remedies is a matter for the exercise of judicial discretion. I think it discreet, ordinarily, to refuse to entertain a suit until the Civil Service Commission has had a chance to pass on the matter.

If we refuse to pass on it until after the Civil Service Commission has acted, then the statute against a suit in this court should not run while the Commission is considering the matter. Thus, if an employee is discharged on April 1, say, and the Commission does not act on the propriety of his discharge until, say, October 1, plaintiff should not be barred from collecting pay that would have accrued on May 1, June 1, July 1, August 1, September 1, and October 1, provided the petition in this Court is filed within six years of October 1, the first day we would have entertained a suit.

Since plaintiffs' suits were filed within six years of the action of the Civil Service Commission, I am of opinion that plaintiffs are entitled to recover all the pay of which they have been illegally deprived. Although a payment was due more than six years before the filing of the petition, the period of limitation on a suit on it does not commence to run until after the Civil Service Commission has acted. The foregoing is, of course, on the assumption that there was no undue delay in appealing to the Civil Service Commission.

I call attention to the distinction we have heretofore pointed out with respect to the tolling of the statute of limitations while administrative remedies are being pursued. The statute is tolled while mandatory administrative remedies are being pursued, but not while optional ones are being pursued. In the cases at bar resort to the Civil Service Commission must be considered a prerequisite to an employee's right to ask a court to adjudicate his claim, in the absence of unusual circumstances, such as those in *Cuiffo* v. *United States,* 131 C. Cls. 60.

Under Judge Littleton's opinion plaintiffs are entitled to recover only such payments as were due to be paid within six years prior to the filing of the petitions. The Chief Judge and I agree they are entitled to this recovery, but, in addition, we think they are entitled to recover payments becoming due while the Civil Service Commission was considering the matter, since their petitions were filed within six years of the action of the Civil Service Commission. Since only two judges concur in this view, judgment can be rendered only for those payments becoming due within six years of the filing of the petitions, four judges agreeing plaintiffs are entitled to recover this much.

LARAMORE, *Judge,* dissenting:

I respectfully dissent for the reason that in my opinion plaintiffs' causes of action accrued at the time of the alleged illegal reduction in grade. *Chorba* v. *United States,* 127 C. Cls. 826, and cases cited therein.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 721

EUGENE S. CONLIN, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–7a) is reported at 146 F. Supp. 833.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1956. The petition for a writ of certiorari was filed on January 29, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTION PRESENTED

Whether a claim for disability retirement pay, filed in 1956 by a non-regular officer who was released from active duty in 1946 without entitlement

to such pay, is barred by the six-year statute of limitations which governs the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.

STATEMENT

Petitioner, a former Reserve Corps officer in the Army of the United States, instituted this proceeding in the Court of Claims on May 29, 1956, to recover disability retirement pay. On December 5, 1956, the court sustained the Government's motion to dismiss the case on the ground that the claim was barred by the six-year statute of limitations. 28 U. S. C. 2501, *supra*. For the purpose of its decision, the court assumed the following essential facts (Pet. App. 1a ff.): On May 1, 1946, after an operation, petitioner, then on active duty, appeared before an Army Retiring Board [1] which found petitioner not permanently incapacitated for active service. On August 27, 1946, petitioner reverted to inactive duty status without disability retirement pay.

[1] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the Board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these Boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

In 1947 and again in 1949, petitioner again appeared before Army Retiring Boards. On both occasions, the Boards declined to recommend that petitioner be granted disability retirement pay. Thereafter, in 1955 and 1956, petitioner sought further consideration by the Army of his claim to disability retirement pay, including consideration by the Army Board for the Correction of Military Records.[2]

In the instant case, petitioner sought a recovery of $237.20 per month from August 27, 1946, the date on which he was first released to inactive duty status without entitlement to disability retirement pay.

ARGUMENT

1. This Court has recently declined to review a decision of the Court of Claims to the effect that a cause of action for disability retirement pay, such as that here involved, accrues at the latest when the officer claimant is released without entitlement to such pay by the Secretary after recommendation by the retiring board.[3] *Barker* v. *United States*, No. 471, this Term, certiorari denied, December 3, 1956, 352 U. S. 935, petition for rehearing denied, January 14, 1957. The *Barker* decision by the Court of Claims (140 F. Supp. 415) was plainly correct and squarely controls the instant case. And *Barker* did no more

[2] Boards for the Correction of Military Records were created by Section 207 of the Act of August 2, 1946, 60 Stat. 837, as amended by the Act of October 25, 1951, 65 Stat. 655 (5 U. S. C. 191a).

[3] As pointed out by the majority opinion below, there is no contention here that the retiring boards' proceedings were not approved by the Secretary of the Army (Pet. App. 3a).

than apply the controlling principle, embodied in 28 U. S. C. 2501 and recognized by this Court as early as *Kendall* v. *United States,* 107 U. S. 123, and as recently as *Soriano* v. *United States,* No. 49, this Term, that Congress permits suits in the Court of Claims only within six years after the cause of action *first* accrues. No exceptions to this jurisdictional limitation are allowed except those specifically provided by Congress, not here involved, to cover instances of legal disability during the limitation period. Here, and in similar cases such as *Barker,* the cause of action first accrued at the time of discharge from service without entitlement to pay. The six-year limitations period began to run at that point, specifically, in August. 1946. Accordingly, the complaint filed on May 29, 1956, was plainly out of time.

Efforts are continually being made in Court of Claims litigation to avoid or toll the time limitation imposed by Congress on that court's jurisdiction to entertain suit. For example, it is contended that the privilege accorded military personnel, after discharge without entitlement to pay, of requesting further review within the permissive Army system gives rise to some sort of new cause of action which suffices to bring into the Court of Claims the incidents of the original discharge. In decisions rejecting such contentions (*Barker* v. *United States, supra; Rosnick* v. *United States,* 132 C. Cls. 1, rehearing denied, 132 C. Cls. 6; *Odell* v. *United States,* 134 C. Cls. 643, rehearing denied 134 C. Cls. 634; see Government's Brief in Opposition in No. 471, this Term, pp. 6–8), the court below has recognized that acceptance of this position would

effectively destroy the limitations period imposed by Congress.[4]

The contention advanced in the instant case is even more extreme. Petitioner contends that, after he has been denied disability retirement pay and discharged without entitlement, a new cause of action arises in him at each point in time at which periodic payments would have been due had he been initially determined to be entitled to such pay.[5] This position would, of course, destroy—or, at the least, drastically curtail—the statute of limitations entirely in this kind of case. Here, and in related decisions, a majority of the court below has consistently refused to accept the so-called continuing claim theory. *MacFarlane* v. *United States*, 140 F. Supp. 420; *Levadi* v. *United States*, 146

[4] In proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of discovery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 134 C. Cls. at p. 645: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[5] This is the so-called "continuing claim" theory which is properly applicable only in pay cases which turn on the interpretation of statute or regulation. See *e. g.*, *Gordon* v. *United States*, 134 C. Cls. 840; *Tanner* v. *United States*, 129 U. S. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States*, 89 C. Cls., 498. The theory has no applicability where, as here, the right to recovery necessarily depends on the factual determination of a board or agency. When the decision of the board or agency is made, the cause of action first accrues. It could not be otherwise, else the factual determination on which the cause of action pivots could be reviewed indefinitely throughout the future.

F. Supp. 455, pending on petition for a writ of certiorari, No. 746, this Term; *Odell* v. *United States*, 134 C. Cls. 634. As the Court of Claims said in the *Odell* case (*supra* at p. 638):

> We know of no case in which this court, or any other court, has held that plaintiff may bring an action more than six years after the determination of his rights by a board or agency given jurisdiction to do so, and this is so even though plaintiff seeks to recover only those payments that would have accrued within six years of the filing of his petition, if the board's decision had been in his favor.

2. Petitioner places considerable emphasis on the decision of the Court of Claims in *Furlong* v. *United States*,[6] decided on the same day as the instant case, in which a claim for disability retirement pay filed in 1954 by an officer separated without entitlement to such pay in 1946 was held not to be time barred. A conflict is asserted between that decision and the instant case. But, on close analysis, no conflict need be found between *Furlong* and this case, insofar as the "continuing claim" theory is concerned.

Petitioner relies entirely on the opinion of Judges Littleton and Madden in the *Furlong* case. The view expressed by those two judges in that case, accepting the continuing claim theory, is, of course, the same as that filed by them as dissenters in the instant case.

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[6] 146 F. Supp. 823. The petition for reconsideration in *Barker*, denied by this Court on January 14, 1957, also directed attention to the *Furlong* decision, as well as to the decision in the instant case and in *Levadi* v. *United States*, *supra*, No. 746, this Term.

The majority in *Furlong* consisted of these two judges together with Chief Judge Jones and Judge Whitaker, the latter two expressing entirely different reasons for the result reached. They held, for reasons which, in our view, are erroneous, that the single cause of action accrued at some point later than 1946 because the claimant there did not appear before a retiring board until 1948. See Pet. App. 3a–15a.

The Government is of the opinion that the result reached in the *Furlong* case is incorrect. A motion for reconsideration in that case is presently pending before the Court of Claims. However, the case does not constitute a holding contrary to the instant case on the continuing claim theory since two of the four judges composing the majority of the court decided the case on the basis of special considerations not present here.

3. We have assumed, for the purpose of discussing the statute of limitations, that the Court of Claims properly entertained this military pay case. For the reasons set forth in our brief in opposition in *Barker*, this Term, No. 471, pp. 9–11, we submit that the Court of Claims is entirely without jurisdiction in this class of case.

CONCLUSION

For the reasons set forth above, we respectfully submit that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 471

WILLIAM R. BARKER, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 140 F. Supp. 415.

JURISDICTION

The judgment of the Court of Claims was entered on May 1, 1956. Petitioner's motion for rehearing, timely filed, was denied July 12, 1956, and his petition for a writ of certiorari was filed on September 1, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the claim of petitioner, an officer in the Army of the United States released from active duty

in 1947 "not by reason of physical disability," is barred by the six-year statute of limitations in the Court of Claims.

STATUTE INVOLVED

28 U. S. C. 2501 provides:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

STATEMENT

Petitioner held commissions in the Officers Reserve Corps and the Army of the United States, neither of which is a component of the Regular Army, under emergency legislation (Deft. Ex. A). After honorable war service during the course of which he was wounded, petitioner, in common with many officers holding comparable commissions, was demobilized as of July 25, 1946, and reverted to inactive status (Deft. Ex. B).[1] His release to inactive duty was "not by

[1] Commissions in the Army of the United States were issued for the duration of World War II and six months or for a period stated in the commission itself (H. Res. 199, Sept. 22, 1941, 55 Stat. 728, 729). Such commissions were terminable at any time at the pleasure of the President or by Act of Congress. Congress, in fact, terminated these commissions as of July 1, 1948 (Act of July 25, 1947, 61 Stat. 451). Reserve commissions of the type held by petitioner were granted pursuant to Section 37 of the National Defense Act (Act of June 3, 1916, as amended, 39 Stat. 189; 42 Stat. 1033, 10 U. S. C. (1946 Ed.) 352, 358) and were terminated on April 1, 1953. Proclamation 2974, April 28, 1952, 17 F. R. 3813; Section 1 (c) of Emergency Powers Continuation Act, 66 Stat. 333.

reason of physical disability," *i. e.*, petitioner was not released because he was considered unfit to perform the duties of an officer (Deft. Ex. B).

In February 1947, petitioner was recalled to active duty status and assigned to Murphy General Hospital for the purpose of physical examination and appearance before an Army Retiring Board.[2] After this examination and hearing, the Board found that petitioner was not permanently incapacitated for active service and recommended that, if assigned, petitioner be assigned to full military duty with a waiver for mild deformity and limitation of movement in his left arm (Pl. Ex. 3). This finding was concurred in by the Surgeon General and approved by the Secretary of War on April 24, 1947 (Deft. Ex. A).

At the hearing before the Board, petitioner stated that he desired to be relieved from active duty and did not desire to remain on active duty with a waiver (Pl. Ex. 3). On May 7, 1947, petitioner was ordered released to inactive duty in the Reserve (Deft. Ex. C).

By order dated February 21, 1951, petitioner was recalled for one day's active duty for the purpose of undergoing a physical examination preliminary to planned orders for extended active duty in the Korean theater (Deft. Ex. D). The examination thus con-

[2] Army Retiring Boards, at the time here material, were convened pursuant to R. S. 1246, 10 U. S. C. (1946 Ed.) 961, and were charged with the function of determining whether an officer, appearing before the board, was capable of discharging the duties of his office. R. S. 1248, 1249, 10 U. S. C. (1946 Ed.) 963, 964. Access to these boards for non-regular officers was created by the Act of April 3, 1939, 53 Stat. 557, 10 U. S. C. 456.

ducted resulted in a finding that he was not qualified for extended active duty (Deft. Ex. E, Item 77).[3] Petitioner was thereafter notified that he had the choice of being separated entirely from the service or of being transferred into the Honorary Reserve (Pl. Ex. 4). He was transferred into the Honorary Reserve (Deft. Ex. F; Pl. Ex. 5).

Asserting an inconsistency between the result reached in 1947 and in 1951 as to his physical qualifications as an officer, petitioner thereafter sought on various occasions to obtain an administrative determination that he had been permanently disqualified to serve as an officer since 1946 and was entitled to disability retired pay. These requests were refused by the Army (Deft. Exs. G, H, and J). After formal procedures were utilized, the Army, in 1954, again accorded petitioner a complete physical examination. Petitioner was again found "* * * qualified for General Duty * * *" (Deft. Ex. K). Reviewing the result of this physical examination, a board of medical officers found petitioner "* * * not incapacitated" for military duty and "* * * capable of performing general military service in a limited capacity" (Deft. Ex. L).

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[3] The special factors entering into the selection of officers for extended active duty in battle are obvious, and the negative result reached as to petitioner's qualifications for this purpose are in no way inconsistent with the findings of the 1947 Retiring Board. The 1947 Board recognized that petitioner's usefulness for extended active duty was questionable but that he was otherwise fully qualified (Pl. Ex. 3, pp. 2, 3). At the 1947 hearing, petitioner himself recognized his limitation for purposes of combat duty. *Id.*, p. 4.

This suit was instituted in the court below on March 14, 1955 (R. 1). On the basis of the events set out above, petitioner requested that court to declare him permanently incapacitated at all times since his release from active duty in 1946 and to award him disability retired pay from that date (R. 4). The Government moved for summary judgment, urging that petitioner's cause of action, if any, accrued more than six years before the filing of the complaint and pointing out that the subject matter of the case was committed to the exclusive control of the Army and therefore beyond the jurisdiction of the court (R. 5; Deft. Motion for Summary Judgment). Petitioner also moved for summary judgment (R. 7). The court held that petitioner's cause of action accrued on May 14, 1947, the date on which he was released to inactive duty without entitlement to disability retired pay (R. 11–14).

ARGUMENT

1. Assuming the power of the Court of Claims to review factual determinations of a highly technical nature committed by statute to the discretion of the armed services (see *infra,* pp. 9–11), we think that court correctly held that petitioner's cause of action accrued when he was released to inactive duty pursuant to the 1947 Retiring Board recommendation, approved by the Secretary of War. This holding is in accord with numerous decisions of the Court of Claims on similar questions. See, *e. g., Field* v. *United States,* C. Cls. 525–53, June 5, 1956; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Girault* v. *United*

States, 135 F. Supp. 521; *Odell* v. *United States,* 135 F. Supp. 539; *Rosnick* v. *United States,* 132 Cls. 1, rehearing denied, 132 C. Cls. 6. In each of these cases, the court has recognized that a claim for disability retired pay matures at the latest when the officer is notified of his release without entitlement to such pay by the Secretary after recommendation by a retiring board.

Concededly, some inconsistent rules appear to have been announced by the Court of Claims in dealing with this general class of cases. But, narrowly construed, many, if not all, of these decisions can be reconciled with the proper rule announced in this case. For example, petitioner relies upon a statement in the *Rosnick* case, *supra,* to the effect that a new cause of action accrues where the decision of a review board is arbitrary, a statement which, of course, would vary the actual period of limitations available to an officer claimant.[4] The *Rosnick* case actually applied the same rule as that governing here and the statement to which petitioner points is dictum. Again, petitioner points to *Capps* v. *United States,* 137 F. Supp. 721, for the same proposition. In the *Capps* case, the court held

[4] It should be noted that the petition in this case contains a naked allegation that the Army Board for the Correction of Military Records "arbitrarily" denied petitioner's application (R. 2). An examination of the record in the case discloses that there could be no substance to this charge. And the Court of Claims itself has recognized that the creation of a cause of action to review arbitrary action is not a mere matter of pleading. See *Rosnick* v. *United States,* 132 C. Cls. 6; *Oro Fino Consolidated Mines, Inc.* v. *United States,* 118 C. Cls. 18, certiorari denied, 341 U. S. 948.

that a claimant's right to disability retired pay, established by the substitution by the Secretary of War of a corrected regulation under the statute, could not be defeated by a Disability Review Board on second hearing by a reexamination of the original facts of record. The court held that, "under these peculiar facts," a separate claim accrued to review this second erroneous action of the Disability Review Board.[5]

Apart from certain inconsistent *statements,* the Court of Claims has never *held* that a cause of action does not accrue for disability retired pay when an officer is separated from service. Nor has it ever *held* that the statute of limitations is tolled as to the cause of action which thus accrues by the availability to the claimant of a statutory review within the services.[6]

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[5] Again, under peculiar facts, a new cause of action was held, in *Uhley* v. *United States*, 121 F. Supp. 674, to arise to review rejection of a claim for disability retired pay presented for the first time to the Board for the Correction of Military Records. The result of such a decision is inconsistent in effect with the principle applied in the instant case and many similar cases. The Government has not accepted the *Uhley* decision (which was interlocutory) nor does it agree that the actions of Disability Review Boards or of the Board for the Correction of Military Records are ordinarily reviewable. Cf. the Court of Claims decisions in *Carlin* v. *United States*, 100 F. Supp. 451; *Spencer* v. *United States*, 102 F. Supp. 774, certiorari denied, 344 U. S. 828, and the Government's brief in opposition in *Spencer*, No. 164, Oct. Term 1952, at pp. 5 *ff.*

[6] The Court of Claims has itself recognized the extreme results of any such holding. It should be remembered that, in proper cases, review may be sought before a Disability Review Board at any time within 15 years of the final action following retiring board proceedings. 38 U. S. C. 693 (i). Again, application to the Board for the Correction of Military Records may be made within three years after date of dis-

On the contrary, it has consistently held that the availability of administrative remedies does not toll the statute of limitations. *Cuiffo* v. *United States,* 131 C. Cls. 60; *Duff* v. *United States,* 135 F. Supp. 527; *Girault* v. *United States,* 135 F. Supp. 521; *MacFarlane* v. *United States,* 140 F. Supp. 420; *Soukaras* v. *United States,* 140 F. Supp. 797.[7]

The short of the matter is this: Here, as in all similar cases, whatever claim petitioner had accrued in 1947 when he was released to inactive duty without entitlement to disability retired pay. His rights, if any, were fixed at that time and nothing in the permissive statutory review system available to him within the Army tolled the running of time on the judicial assertion of his rights.[8] Accordingly, the de-

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covery of the alleged error or injustice or ten years after date of enactment of the statute creating that Board. 5 U. S. C. 191 (a). Recognizing these time factors, the Court of Claims said, in *Odell* v. *United States*, 135 F. Supp. at p. 541: "* * * But we think that Congress did not, by this provision, intend that cases might be brought in this court 21 years after the pertinent facts had occurred."

[7] There is no need to discuss petitioner's reliance on the district court opinion in *Randolph* v. *United States*, 69 F. Supp. 156 (S. D. Tex.), erroneously shown in the petition for certiorari as arising in the District of Columbia. The *Randolph* case, affirmed on appeal, 158 F. 2d 787 (C. A. 5), has no connection with the problem of exhaustion of remedies or the impact of that doctrine in tolling the statute of limitations. The case held that a district court suit for an officer's disability retired pay was an unconsented suit against the United States and was not within the scope of the Tucker Act since it was a suit for a "pension."

[8] It should be observed that the Court of Claims has never dismissed a case of this type for prematurity where it appeared that the officer claimant had not invoked the internal service mechanism for review, another indication of the position of the Court of Claims that such remedies are purely permissive.

cision below is correct and in accord with the settled law, and there is no occasion for review by this Court.

2. There is, we think, additional reason why review should not be granted. The Court of Claims has exercised traditional jurisdiction in certain types of military pay cases, namely, those in which the question presented for decision involved no inquiry by the court into factual and technical questions of basic entitlement committed by statute to the exclusive jurisdiction of the armed services. In the usual case, the court was called upon, on an undisputed set of facts, to determine the meaning of a statute or regulation for the purpose of pay computation. See, *e. g., Tanner* v. *United States,* 129 C. Cls. 792, certiorari denied, 350 U. S. 842; *Commings* v. *United States,* 89 C. Cls. 498.[9] The case of *Lemly* v. *United States,* 109 C. Cls. 760, decided in 1948, marks the first occasion on which the Court of Claims assumed jurisdiction to review and reverse *factual* determinations fixing the basic relationship between a service and its officers, *i. e.,* whether an officer should be retained or separated and, if separated, in what status. Problems of accrual of causes of action, such as that presented here, stem from this assumption of jurisdiction. In our view, there is at least great doubt as to whether the matters which the Court of Claims is now reviewing in this

[9] These cases constitute the so-called continuing claim cases to which petitioner attempts to resort. In a proper continuing claim case, a determination of a question of law in the claimant's favor merely requires that judgment be given for the amount of the monthly payment so determined for the period in suit but not to exceed six years. See, *e. g., Commings* v. *United States, supra.*

area are within its power. The basic relationship between the military services and their officers—retention or separation—is committed by statute to the discretion of the President or the Secretaries. The statutes in this case are illustrative; see R. S. 1245, 10 U. S. C. (1946 Ed.) 931; R. S. 1246–1253, 10 U. S. C. (1946 Ed.) 961–966.[10] Nothing could be more crucial to internal military management than the question, arising in countless cases and in infinitely varied circumstances, of the status of its officers. And it has been repeatedly held that courts are without power to interfere in matters of internal management of military establishments. See, *e. g., Orloff* v. *Willoughby,* 345 U. S. 83, 93; *Denby* v. *Berry,* 263 U. S. 29; *Reaves* v. *Ainsworth,* 219 U. S. 296; *Creary* v. *Weeks,* 259 U. S. 336, 344.

The Court of Claims appears to have recognized this general rule of non-interference by the judiciary in cases involving the question really presented by this case, namely, whether an officer is medically fit or not to serve in the military forces. In *Wales* v. *United States,* 132 C. Cls. 765, the court said (at p. 769):

> The Medical Board found that plaintiff was fit for general military duty at the time of his release by the Secretary to inactive duty. This finding still stands. This court can not under-

[10] These and similar disability retirement statutes have been replaced by Section 402 (a) of the Career Compensation Act of 1949, 63 Stat. 816, 37 U. S. C. 272a. The Career Compensation Act continues the discretionary power of the services to deal with the question of retirement for disability.

take to determine who is fit or unfit to serve in the military forces. *Holliday* v. *United States* [128 C. Cls. 647]. *Beamish* v. *United States,* 130 C. Cls. 767, 128 F. Supp. 158. And, as stated in *Orloff* v. *Willoughby,* 345 U. S. 83:

> * * * judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

We submit that this principle of the *Wales* case completely disposes of this case. Petitioner is asking that a court declare him unfit to serve as an officer, after the Army has called him fit. This a court cannot do.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1956

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